IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 166 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA : Sd/-

HONOURABLE MR.JUSTICE KS JHAVERI : Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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OSAMAN @ DHABO SULTANBHAI NAREJA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MS SADHANA SAGAR for Appellant(s) : 1,
MR HL JANI APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 21/11/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. This appeal under Section 374 of the Code of Criminal Procedure has been preferred by the present appellant-accused being aggrieved and dissatisfied by the judgment and order of conviction dated 25.01.1999 passed by the learned Sessions Judge, Rajkot in Sessions Case No.12/1998 whereby he was sentenced to undergo rigorous imprisonment for life for the charge under Section 302 of the Indian Penal Code. However, he was acquitted for the charge under Section 506(2) of the Indian Penal Code and under Section 135(1) of the Bombay Police Act.

2. The case of the prosecution in short, is as under:

2.1 The Police Constable viz., Dhiraj Thakar, who was discharging his duty at Civil Hospital, Rajkot on 28.10.1997 at about 7:00 p.m., received information regarding homicidal death and as it was medico-legal case, he informed the concerned Police Station on telephone. On receiving the same, it has been

registered by Shri M.K. Parmar as A.D.No.81/1997 with Pradhyumannagar Police Station and, thereafter, same was handed over to P.S.I., Shri Chauhan. In pursuance of that, he went to Civil Hospital, Rajkot, drew in question panchnama in the presence of panchas, filled up the Maranottar Form and also made arrangement to send the dead body for the purpose of postmortem along with yadi. On the same night at about 10:00 p.m., he went to the scene of offence, called the panchas and prepared panchnama of scene of offence and also collected muddamal as narrated in the scene of offence panchnama. Thereafter, he investigated further into the matter, recorded the statements of various witnesses and obtained report from the Medical Officer about the cause of death and, thereafter, he himself has become the complainant and filed the complaint against the present appellant-accused into Pradhyumannagar Police Station, which came to be registered as Pradhyumannagar Police

Station I-C.R.No.490/1997 under Sections 302 and 506 of the Indian Penal Code and under Section 135 of the Bombay Police Act and entry to that effect has been made in the station diary also. Thereafter, further investigation was entrusted to Police Inspector, Shri Pavar along with report. In pursuance of that, he took over the charge of the investigation and seized the clothes, worn by the deceased at the time of incident, given by the doctor, who has performed the postmortem under panchnama and, thereafter, he has also recorded the statement of Nurbaiben and Dipakbhai etc. He arrested the accused by preparing arrest panchnama and sent him to judicial custody. Since, the accused showed willingness to produce the weapon alleged to have been used in the commission of offence, two panchas were called and prepared primary panchnama at Pradhyumannagar Police Station. Thereafter, the Investigating Officer along with the accused, panchas and other police personnel

proceeded in a jeep as guided by the accused. Thereafter, accused asked to stop the jeep at a particular place and he found out and produced the muddamal wooden log. Same was seized by preparing panchnama. He wrote yadi for preparing map of scene of offence and sent the muddamal to FSL. On receiving FSL & postmortem reports, same were kept with the investigation file.

2.2 At the end of investigation, chargesheet came to be submitted before the Court of Learned J.M.F.C, Rajkot. As the offence alleged against the accused was exclusively triable by the Court of Sessions, same was committed to the Court of Sessions, Rajkot, which came to be numbered as Sessions Case No.12/1998.

2.3 Thereafter, the case was transferred and placed for trial before the learned Sessions Court, Rajkot for disposing the same on merits and on production of the accused, the Learned Sessions Judge framed charge vide Exh.1 against the accused. The accused pleaded not guilty to the charge and claimed

to be tried.

2.4 To prove the case against the appellant-accused, the prosecution examined as many as 16 witnesses viz., Prosecution Witness No.1 viz., Dipakbhai Muljibhai (witness of incident), Exh.8, Prosecution Witness No.2 viz., Ibhubhai Alibhai Jenena (Panch Witness), Exh.9, Prosecution Witness No.3 viz., Mansukhlal Dhanjibhai Kotak (Panch Witness), Exh.11, Prosecution Witness No.4 viz., Kishorkumar Babubhai Kadam (Panch Witness), Exh.13, Prosecution Witness No.5 viz., Dr.Govindbhai Khodabhai Parmar, Exh.17, Prosecution Witness No.6 viz., Nurbaiben Yusufbhai (witness of incident), Exh.22, Prosecution Witness No.7 viz., Kasturben Hemubhai Rathod, Exh.23, Prosecution Witness No.8 viz., Hemubhai Chunilal Rathod, Exh.24, Prosecution Witness No.9 viz., Nashir Abdulbhai Juneja (son of the deceased), Exh.25, Prosecution Witness No.10 viz., Ramjibhai Naranbhai Vala (Circle Officer), Exh.26, Prosecution Witness No.11 viz.,

Iliyas Alibhai Hingor, Exh.29, Prosecution Witness No.12 viz., Dhirajlal Chandrashankar Thakor (Police Head Constable), Exh.31, Prosecution Witness No.13 viz., Mansing Khodubhai Parmar (Head Constable), Exh.33, Prosecution Witness No.14 viz., R.S. Chauhan (P.S.I.), Exh.36, Prosecution Witness No.15 viz., Shaktidan Ratubhai Isarani (Head Constable), Exh.38 and Prosecution Witness No.16 viz., Atmaram Pandurang Pawar (Police Inspector – Investigating Officer), Exh.42. The prosecution also placed reliance upon documentary evidence numbering 30.

2.5 On submission of closing purshis by the prosecution, learned Judge recorded further statement of the accused under Sec.313 of Cr.P.C. qua the incriminating question wherein the accused came out with the case of total denial. The accused did not examine any witness nor stepped into the witness box. Therefore, after hearing the learned counsel appearing for the respective parties, learned Sessions Judge delivered the impugned

judgment giving rise to file the present appeal.

2.6 Being aggrieved by the Judgment and Order of conviction and sentence awarded by the Court below, the appellant-accused has preferred this appeal.

3. We have heard learned counsel for the appellant, Ms.Sadhana Sagar and learned Additional Public Prosecutor, Mr.H.L. Jani for the State. We have been taken through the record and proceedings by both the sides.

4. It has been mainly argued by the learned counsel for the appellant-accused, Ms.Sagar that the appellant-accused is totally innocent person and he has been falsely involved into crime in question. It is also argued that the complainant was a head strong person and having number of enemies and also facing various criminal proceedings and, hence, he might have been assaulted by some one from them.

4.1 She has taken us through oral evidence of P.W.No.6 viz., Nurbaiben Yusuf and argued

that she is not the witness of incident.

4.2 She has also taken us through the evidence of P.W.No.1 viz., Dipakbhai Muljibhai and argued that he is the person, who came to know regarding the incident when he was informed by Nurbaiben (P.W.No.6).

4.3 She has also taken us through the evidence of two other witnesses i.e. P.W.No.7, Kasturben Hemubhai, Exh.23 and P.W.No.8 viz., Hemubhai Chunilal, Exh.24 and argued that the prosecution has examined the above referred witnesses on the ground that the accused has made extra-judicial confession before them, but as such, it is not an extra-judicial confession and, hence, their evidence is not required to be believed.

4.4 She has also taken us through the evidence of P.W.No.5, Dr.Govind, Exh.17, who has performed the postmortem of the deceased and through him, the prosecution has proved the P.M.Note, Exh.18.

4.5 It is also argued that looking to the nature of the injuries, it should not be treated as

offence under Section 302 of the Indian Penal Code. She has also taken us through the oral evidence of panch witness of the discovery panchanama together with the discovery panchnama and argued that it is not a discovery panchnama in eye of law.

4.6 Ms.Sagar has, therefore, urged that it is a case, which requires interference and at the most, the sentence is required to be reduced.

5. Mr.H.L. Jani, learned Additional Public Prosecutor, who appears on behalf of the respondent-State has taken us through the above referred evidence, upon which, reliance has been placed by the learned counsel for the appellant.

5.1 It is submitted that the prosecution has proved the guilt against the appellant-accused beyond reasonable doubt, for which, he has placed reliance upon the evidence of eye witnesses viz., Dipakbhai Muljibhai (P.W.No.1-Exh.8), Nurbaiben Yusufbhai Vavad (P.W.No.6-Exh.22), Kasturben w/o. Hemubhai Rathod (P.W.No.7-Exh.23) and Hemubhai

Chunilal Rathod (P.W.No.8-Exh.24.

5.2 He has also placed reliance upon the evidence of Dr.Govind Parmar along with the P.M.Note and argued that it is a case, wherein wooden log blows have been given by the appellant-accused to the deceased and as a result of that, the deceased succumbed to the injuries, which resulted into 302 of the Indian Penal Code. It is submitted that looking to the nature of injuries, number of blows given and also looking to the part selected by him, it cannot be said that it is not an offence of 302 of the Indian Penal Code.

5.3 It is also submitted that there are evidence on record which connect the accused with the crime in question and merely because the deceased was facing some criminal proceedings, the benefit cannot be given to the appellant-accused. It is also argued that there are evidence of witnesses, before whom, the accused has made extra-judicial confession and also the evidence of the witness, who was informed in a fraction of

minute by the eye witness regarding the incident and all have categorically deposed before the Court and nothing contrary has come out in their evidence and, hence, their evidence is trustworthy, free from doubt and prove the guilt against the appellant-accused.

5.4 Looking to the facts and circumstances of the case and seriousness of the offence, sentenced awarded by the Court is just, proper and reasonable one. Mr.Jani has, therefore, urged that the learned trial Judge was perfectly justified in coming to the conclusion that the appellant-accused has committed the crime and, therefore, the Court should not interfere with the same. Raising the abovesaid contentions, Mr.Jani has urged that the present appeal deserves to be dismissed.

6. We have gone through the oral as well as documentary evidence and the reasoned judgment delivered by the Court below shown to us by the learned counsel for the

respective parties.

6.1 It is required to be noted that for the purpose of deciding this appeal, though the prosecution has examined as many as 16 witnesses and produced various documentary evidences, following witnesses are the important witnesses viz., Dipakbhai Muljibhai (P.W.No.1-Exh.8), Nurbaiben Yusufbhai Vavad (P.W.No.6-Exh.22), Kasturben w/o. Hemubhai Rathod (P.W.No.7-Exh.23) and Hemubhai Chunilal Rathod (P.W.No.8-Exh.24.

6.2 P.W.No.1-Dipakbhai Mulji is the neighbour of P.W.No.6 and the person, who had an opportunity to see the appellant-accused going armed with wooden log and same has been informed in detail immediately after the incident by her. She is also the witness of incident. Not only that, this witness was threatened by the appellant-accused to keep mum.

6.3 P.W.Nos.7 & 8 are the witnesses, before whom, the appellant-accused has made extra-judicial confession.

6.4 As far as homicidal death is concerned, the prosecution is able to prove the same by way of evidence of Dr.Govindbhai Parmar (P.W.No.5, Exh.17), who performed postmortem on the dead body of the deceased on 28.10.1997. Through him, the prosecution has also proved the P.M.Note, Exh.18.

6.5 The prosecution has also proved blood stain found on the wooden log, which has been discovered at the instance of appellant-accused vide discovery panchnama, Exh.12. The FSL Expert vide report, Exh.53, gave specific opinion that the blood found on the wooden log was human blood and was 'A' group. So for the purpose of deciding this appeal, we have taken into consideration the above referred witnesses and other evidence on record.

6.6 Before proceeding further with the matter, it is required to be noted that the prosecution has placed reliance upon only one eye witness i.e. P.W.No.6, Nurbaiben Yusufbhai Vavad, Exh.22. She has categorically deposed before the Court that she along with her husband was

staying in Gayakvadi Sheri No.3, which is known as Mafatiya Para in the house of Meghjibhai Vaghari as a tenant and on the date of the incident at about 7:00 p.m., she was standing in front of her house. At that time, she saw that the deceased was passing through her house and the appellant-accused was following him from behind armed with wooden long in his hand. She has categorically deposed that she knows both persons i.e. the deceased and the appellant-accused since last 20 years as all are residing in the same vicinity. She has further deposed that when the appellant-accused, who was following the deceased from behind, reached very near to the deceased, gave wooden log blows on the head of the deceased. As a result of that, the deceased fell down there itself and blood oozed out from his head. According to her, she saw the incident and, therefore, she immediately went to the house of Dipakbhai (P.W.No.1) and narrated the whole incident to him and,

therefore, even Dipakbhai also came to scene of offence. Over and above, family members of the deceased also reached there and took the deceased in the Civil Hospital in an autorickshaw. She has also deposed that the Police recorded her statement. She also identified the accused into the Court as also the muddamal wooden log. She has been thoroughly cross-examined by the learned advocate appearing for the accused before the Court below. We have gone through her evidence, but nothing contrary has come on record which shake her evidence. On the contrary, she stuck to her version which she has narrated in her statement before the Police.

6.7 As far as her presence is concerned, she has categorically deposed that she is staying in the same vicinity very near to the place of offence along with her husband and children in the house of Meghji Vaghari. She has also deposed that she, the deceased and the accused are the neighbours and are residing

since last 20 years in the same vicinity. When she was was standing in front of her house, she saw the incident in question and narrated the incident in detail. In view of the above, question of misidentification of the accused may not be arisen at all. As she is staying very near to the scene of offence, which proved from the panchnama of scene of offence, Exh.14, wherein the panchas have narrated that the place of incident is 40ft. away from the house of Nurbaiben and she has seen the incident from a distance of 10-12 ft. Not only that, prior to that, she had an opportunity to see the deceased and the appellant-accused and, therefore, as stated above, the question of misidentification may not be arisen. There is no reason to disbelieve her evidence when her evidence is found to be trustworthy even after detailed cross-examination.

6.8 We accept that there are no eye witnesses of incident. There is no law indicating as to the number of eye witnesses that would be

required in an incident. Here in this case, since there is only one eye witness, the prosecution cannot be asked to bring other eye witness. What is required to be done in that situation is to be more careful while going through her evidence as it requires minute scrutiny and if the Court comes to a conclusion that her evidence is trustworthy, believable, not concocted one and free from doubt then, the Court can certainly rely upon and convict the accused based on the evidence of solitary witness.

6.9 Over and above, the evidence of P.W.No.1, Dipakbhai Muljibhai, Exh.8 also supports the say of the prosecution. He has categorically deposed before the Court that on 28.10.1997 at about 7 p.m., he was sitting in front of his house. At that time, the deceased was passing through said road and the accused was following him armed with wooden log from behind. He also tried to inquire from him, but the accused by showing gestures indicated not to inquire anything. As per his

deposition, after some time, the appellant-accused again came back running armed with wooden log. He has also deposed that immediately, thereafter, Nurbaiben came to his house and narrated the incident in detail to him along with the name of the assailant and the weapon used and the part of the body selected by him. He has also deposed that, therefore, he went to the scene of offence and saw that the accused was lying in a pool of blood and was in conscious condition having injury on head. He has further deposed that after about an hour i.e. at about 8 p.m., the appellant-accused came to his house and threatened him from disclosing the incident to anybody, or else, he also would be faced with the same fate. He has further deposed that he knows the appellant-accused and the deceased as they are residing in the same vicinity since last more than 20 years. He has also identified the appellant-accused and the muddamal wooden log into the Court. He has been thoroughly cross-examined, but

nothing contrary has come on record and, hence, his evidence is also found to be trustworthy and believable.

6.10Over and above, there are two other witnesses i.e. the P.W.No.7 viz., Kasturben Hemubhai Rathod, Exh.23 and P.W.No.8, Hemubhai Chunilal Rathod, Exh.24. Both have categorically deposed in their evidence in detail in paragraph no.2 of their respective evidence and nothing contrary has been come out in their evidence. They have also deposed that they were having good relation with the appellant-accused, then also, they stuck to the version given before the Police. In the cross-examination, nothing contrary has come out. Their presence is also natural as they are also staying in the same vicinity and as they know to each other.

6.11The prosecution gets support from the above referred evidence of Nurbaiben, Dipakbhai, Kasturben and Hemubhai. Not only that, through the above referred witnesses, the prosecution is able to prove that at the time

of incident at about 7 o'clock in the evening, the deceased was passing through the house of Nurbaiben and the appellant-accused was chasing him along with wooden log and, thereafter, he has given wooden log blows on the head of the deceased, which resulted into 302 of the Indian Penal Code.

6.12As discussed above, the evidence of Nurbaiben gets support from the evidence of Dipakbhai Muljibhai, Kasturben w/o. Hemubhai Rathod and Hemubhai Chunilal Rathod and as we have stated above, all are from the same vicinity and, hence, in any circumstances, they cannot be said to be chance witnesses. Even time of incident is such that normally every person along with family members would be found at home, more particularly, lady members and, therefore, we have believed the evidence of above referred evidence. Not only that, they also get support from the panchnama of scene of offence, Exh.10, which also established that the scene of offence is in front of the house of Meghji Vaghaii, where Nurbaiben is

residing as a tenant since last 20 years. The distance between the scene of offence and their house is about 10-12 ft. and, therefore, one can certainly come to a conclusion that she was able to see the incident. Not only that, the prosecution also gets support from the evidence of panch of recovery panchnama, Exh.12 and same has been proved by way of evidence of P.W.No.3, Mansukh, Exh.11. Through him, the prosecution has proved that it is a discovery panchnama, wherein the appellant-accused has shown willingness to produce the muddamal wooden log and same has been produced by him by way of discovery panchnama and place is also such, which is not easily accessible to all. Not only that, the blood stain was found upon the wooden log and as per the FSL Report, Exh.53, it was of human blood of group 'A'. It is also proved by the prosecution that the blood group of the deceased was 'A'. So the prosecution also gets support from the above strong evidence. In view of all the above

evidence, the prosecution has proved the guilt against the accused beyond reasonable doubt.

6.13As far as the homicidal death is concerned, same has not been disputed by the learned counsel for appellant-accused. Then also, we have gone through the same and it is proved by the prosecution by way of oral evidence of Dr.Govind Parmar, P.W.No.5, Exh.17. Through him, the prosecution has also proved the P.M.Note Exh.18. The doctor has categorically opined that the injuries received on the head of the deceased and the injury nos.1 to 3 could be possible by way muddamal wooden log. Not only that, it has been argued that all the injuries found upon the dead body of the deceased are anti-mortem and are sufficient to case death in the ordinary course of nature.

6.14It is also established from Col.Nos.17 and 20 of the postmortem report that the deceased succumbed to the injuries received by the wooden log and the prosecution has also

proved that it is a case of homicidal death and same has not been disputed.

6.15In view of the above, we are of the view that the prosecution has proved the case against the appellant-accused beyond reasonable doubt and, hence, the Judgment and Order of conviction delivered by the Court below is just, legal and proper and does not require to be interfered with in this appeal. Looking to the serious nature of injuries inflicted upon the deceased and other aspects, the sentence awarded by the Court below is also just and proper and same is also not required to be interfered with.

6.16In view of the above, since there is no substance in any of the arguments advance by the learned counsel for the appellant-accused, this appeal is required to be dismissed.

7. The appeal is dismissed.

Sd/- *Sd/-*

(R.P.DHOLAKIA, J.) ***(K.S.JHAVERI, J.)***

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